Bail Slip

The Appellant/Accused was directed to be released on bail by the order of this Court dated 05.03.2007 and passed in Crl.MP.No.175 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 08.08.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.224 of 2006

Prabhakaran .. Appellant (Accused)

Vs.

State by
The Inspector of Police,
H-6, Radhakrishnan Nagar
Police Station,
Chennai.
Cr.No.1194/2004 .. Respondent (Respondent)

Prayer:- This appeal has been preferred against the judgments dated 16.11.2005 made in S.C.No.365 of 2005 on the file of the Sessions Judge/Mahila Court/Magalir Neethimandram, Chennai.

For Appellant :Mr.N.Sudharasan
For Respondent :Mr.V.R.Balasubramanian
Additional Public Prosecutor

JUDGMENT

The accused, who has been convicted under Section 366 and Sentenced to undergo 7 years RI and a fine of Rs.1,000/- with default sentence and convicted and sentenced under Section 376 IPC to undergo 7 years RI and a fine of Rs.1,000/- with default sentence in S.C.No.365 of 2005 on the file of the Magalir Neethimandram, Chennai, is the appellant herein.

2.The short facts of the case of the prosecution is that on 18.10.2004 the accused had kidnapped the victim girl while she was proceeding to her school, to the house of his uncle's son Samuvel. Thereafter, on the following day took her to Voyila village at Nellur, Andra Pradesh, where he stayed with the victim girl in the house of one Kondamma, a known person and then on the next day ie. on 20.10.2004 the accused took the victim girl to Kuchi village in Andhra Pradesh, where they stated in the house of Bhavani for two days and on 22.10.2004 the accused took the

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victim girl to Kavali village in Andra Pradesh and stayed in the house of one Kotaiah and while they were staying at Voyila village for two days, the accused had in order to prevent the victim girl from making any alarm gagged her and during the stay at Voyila village in the house of Kondamma had committed the offence of rape on the victim girl and thus the accused has been charged under Section 366, 341 & 376(1) IPC.

3.The case was taken on file by the learned XV Metropolitan Magistrate, George Town, in PRC.No.128 of 2004 and on appearance of the accused on summons furnished copies under Section 207 of Cr.P.C., and committed the case to the Court of Sessions under Section 209 of Cr.P.C.

4.The learned trial Judge on appearance of the accused had framed charges against the accused under Section 366, 341 & 376(1) IPC and charges were explained to the accused and when questioned the accused pleaded not guilty. Before the trial Court P.W.1 to P.W.8 were examined and Ex.P.1 to Ex.P12 were exhibited. No material objects were marked.

5.P.W.1 is the mother of the victim girl. According to her, her husband had deserted her some 15 years prior to the occurrence and that the victim girl is her youngest daughter and at the time of occurrence her daughter, the victim girl Santhiya Rani was studying in Daniel Matriculation School in 9th standard. On 18.10.2004 it was drizzling as her daughter went to the school, but did not return in the evening. Her son, who was studying 11th standard went to the school in search of the victim girl Santhiya Rani, returned by stating that that he was informed that his sister did not come to school. After her search in the relatives house proved futile, she preferred a complaint with the RK Nagar police station on 19.10.2004 at 7.00 pm under Ex.P.1. On 26.1.2004 at about 4.00 pm to respond a call from the police station she went there and saw her daughter in the police station. On enquiry the victim girl informed that she was kidnapped by the accused to Athippattu, thereafter to Nellur and was subjected to sexual assault by the accused and that the date of birth of her daughter victim girl is 18.1.1991. Ex.P.2 is the birth certificate.

6.P.W.2 is the victim girl. She would admit that her date of birth is 18.1.1991 and that she knows the accused, who was residing with his aunt's house under the same roof. But she was residing with her parents separately. On 18.10.2004 at about 8.40 am her mother accompanied her to the school since it was drizzling. After her mother had left for home, the accused came there and asked her to follow him. When she refused to go with him he pacified her by saying that only to have a chat he requested her to come along with him. According to her, he criminally intimidated her and took her in an auto and got down at Basin Bridge railway station from where he took her to Athipattu village in a train and that she stated there in one of the relatives house of the accused and that nothing happened on the said night. But on the following day ie., on 19.10.2004, the accused took her to Voyila village and stayed in one of his relatives house, where he had committed the offence of rape after gagging her. On 20.11.2004 the accused took her to Kuchi village and informed the

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villagers that he is going to marry her (P.W.2), where she had stayed in a house for two days, where also the accused had sexual intercourse with her. Thereafter on 22.11.2004 the accused took her to Kavali village and stayed in a rented house for two days and on the 3rd day her uncle came there with four or five persons and took her to the village on 24.11.2004 and that she had narrated to her uncle what had happened to her. She would depose that the accused also accompanied her up to the house of the panchyat president and with the help of her uncle, she came to Madras and that she was produced before the police on 26.10.2004. She had also given a statement to the police and two months thereafter she was taken to a Magistrate Court from where she was sent to hospital for a medical check up and was also examined at RSRM hospital.

7.P.W.3 is the grand father of P.W.2. He would depose that his grand daughter P.W.2 went to school on 18.10.2004, but did not return in the evening and that his daughter had preferred a complaint on 19.10.2004 with the police, but the police have refused to register the complaint. Hence, he went and met the Commissioner of Police on 20.10.2004 and on the advise of the Commissioner, he again went to the police station and preferred the complaint on 21.10.2004. His grand daughter, the victim girl, returned to the house on 25.10.2005. As per the instruction of the police his daughter had stated in the complaint that her daughter the victim girl had left the house in anger since she was not offered with new cloths. On enquiry his grand daughter P.W.2 had informed that the accused took her to many villages and committed the offence of rape. Since the police have failed to take action on the complaint preferred by them, with the help of an advocate a petition was filed before the High Court for necessary direction to the police to take necessary action in the complaint preferred by his daughter.

8.P.W.4 is the uncle of the accused. He has not supported the case of the prosecution. Hence, he was treated as hostile witness.

9.P.W.8, the Investigating Officer in this case, in his evidence would state that on 21.10.2004, P.W.1 appeared before the police station and preferred a complaint which was registered by then Sub-Inspector of Police under Cr.No.1194 of 2004 under the caption 'girl missing'. On 26.10.2004 P.W.1 again appeared in the police station and informed that her daughter P.W.2 had voluntarily came to the house and has requested the police not to take any action on the complaint preferred by her. P.W.3 had filed Crl.O.P.No.35407 of 2004 before the High Court for direction and as per the order of this Court in the said OP by the High Court, the case was taken up for investigation.

10.P.W.7 is the Sub-Inspector of Police, who had registered the case under Cr.No.1194 of 2004 under the caption 'girl missing' on the basis of Ex.P.1 complaint preferred by P.W.1. Ex.P.9 is the printed FIR. He would also state that on 26.10.2004 P.W.1 again appeared in the police station and informed that her daughter had come back to the house and that she is not pressing the complaint.

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11.P.W.5 is the doctor, who had examined P.W.2 on 4.12.2004 brought by woman police constable No.244 and head constable NO.11053. On examination she could not find any injury on the person of the victim girl. The hymen of the victim girl was absent and her vagina admits one finger. Ex.P.4 is the certificate issued by her. Ex.P.5 is the relevant form annexed with Ex.P.4-certificate. Ex.P.6 is the vaginal smear report.

12.P.W.6 is the doctor, who had examined the accused and issued Ex.P.8 certificate on the basis of the letter of requisition Ex.P.7. The doctor has proclaimed that the accused is potent.

13.P.W.8 had continued his investigation and examined the witnesses and recorded their statements. He had arrested the accused on 6.12.2004 at 9.45 am and has recorded the statement of the accused. After following the formalities, he had filed the charge sheet against the accused on 16.3.2005 under Section 341, 366 & 376(1) IPC.

14.When incriminating circumstances were put to the accused under Section 313 of Cr.P.C., he would deny his complicity with the crime. He has not examined any witness on his side. After analysing the evidence both oral and documentary the learned trial Judge has come to the conclusion that the offence under Sections 341, 366 and 376 IPC have been proved beyond any reasonable doubt against the accused and accordingly convicted and sentenced the accused under Section 366 IPC to undergo 7 years RI and slapped a fine of Rs.1,000/- with default sentence and has convicted and sentenced the accused under Section 376(1) IPC to undergo 7 years RI and a fine of Rs.1,000/- with default sentence, and has not imposed any separate sentence for an offence under Section 341 IPC. Aggrieved by the findings of the learned trial Judge, the accused has preferred this appeal.

15.Now the point for determination in this appeal is whether the conviction and sentence passed by the trial Court against the accused under Section 366, 341 & 376 IPC are sustainable for the reasons stated in the memorandum of appeal?

16.The Point:- 16(a)Heard the learned Counsel Mr.N.Sudharsan appearing for the appellant and Mr.V.R.Balasubramanian, the learned Additional Public Prosecutor and considered their respective submissions. The learned counsel appearing for the appellant would contend that there is absolutely no evidence on record to show that the accused had kidnapped the victim girl from the lawful custody of her parents to warrant conviction under Section 366 IPC. A careful consideration of the evidence of P.W.2, the victim girl, will go to show that on the date of occurrence ie., on 18.10.2004 at about 8.40 am while she was proceeding to her school since there was drizzling her mother accompanied her till halfway and after her mother's return, the accused came there and asked her to follow her and criminally intimidated her to board in an auto and took her to Basin Bridge railway station and from there took her to Athipattu in train. The

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complaint Ex.P.1 itself was preferred only on 21.10.2004. The explanation given in the complaint for the delay in preferring the complaint is that after coming to know that P.W.2, victim girl, did not attend the class on 18.10.2004, a search was made in the relatives house for two days, and thereafter the complaint was preferred on 21.10.2004, since the search ended in vain. According to the evidence of P.W.2 she had accompanied the accused to Athipattu in a train from Basin Bridge railway station, thereafter to Voyila village and from there to Kuchi village in Nellur district, Andra Pradesh, from there to Kavali village and for nearly one week she (P.W.2) had stated with the accused in the above said villages. Even in her evidence before the Court as P.W.2, the victim girl, had not stated that she had made any resistance or complained to any person during those days. According to her, her uncle came and rescued her with 4 or 5 persons at Kavali village. The said uncle of P.W.2 was also not examined in this case to show that only under the rescue operation of the uncle of P.W.2, P.W.2 was rescued from the clutches of the accused. Even on 18.10.2004 at about 8.40 am near the school from where the accused is said to have kidnapped the victim girl P.W.2, she has not raised any alarm or distress call to attract her schoolmates or the public to warrant conviction under Section 366 IPC. As per Section 366 IPC, there must be an intention on the part of the accused to kidnap or abduct the victim girl for the purpose of compelling her to marry against her will or by force or seduce for illicit intercourse. From the evidence of P.W.2 it cannot be said that the accused had with an intention to kidnap or abduct P.W.2. On the other hand without any resistance P.W.2 had eloped with the accused from Chennai to Voyila, Kuchi and Kvali villages in Andra Pradesh. So the conviction and sentence by the trial Court under Section 366 IPC, I am of the view, cannot by sustainable.

16(b)When coming to the conviction and sentence of the accused under Section 376 IPC, the evidence of P.W.2 is that the accused had sexual intercourse with her at Voyila and also at Kuchi villages. The evidence of P.W.2 has been corroborated by the medical evidence of P.W.5, the doctor Premalatha. As per Ex.P.3 copy of the accident register issued by P.W.5, the lady doctor, the hymen of P.W.1 was found ruptured. The doctor P.W.6, who had examined the accused had certified that the accused is capable to committing the offence of rape. There is no external injury found in the person of the victim girl P.W.2 as per the evidence of P.W.5, the lady doctor. According to P.W.2, her date of birth is 18.1.1991. The occurrence had taken place on 19.10.2004. So at the time of occurrence, the victim girl P.W.2 was only 13 years of age, a minor. Under such circumstances, even though P.W.2 is a consenting party to the crime since it is proved that at the time of occurrence the victim girl was only a minor below the age of 16 years, the consent of P.W.2 is immaterial to bring home the guilt of the accused under Section 376 PC. The leanred counsel for the appellant at this juncture would plead for some leniency on the question of sentence of the accused, taking into consideration the age of the boy and the circumstances that both the accused and the victim girl are relatives, living in the same compound. The learned counsel for the appellant would further plead for the

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appellant that if the girl is not a minor at the time of the occurrence, then the charge under Section 376 IPC itself will go against him. So taking into consideration the age of the boy and close relationship of the victim girl and the accused and also the fact that the victim girl had accompanied the accused to several villages without any resistance in Andra Pradesh, I am of the view that while confirming the findings of the learned trial judge under Section 376 IPC the sentence alone can be modified to that of 4 years RI instead of 7 years RI. Point is answered accordingly.

17.In fine, the appeal is allowed in part and the conviction and sentence under Section 366 IPC in S.C.No.365 of 2005 on the file Sessions Judge/Mahila Court/Magalir Neethimandram, Chennai, is set aside and the conviction under Section 376 IPC is confirmed but the sentence alone is modified to that of 4 years RI instead of 7 years RI. The fine imposed by the trial Court under Section 376 IPC will sustain. The accused is entitled to refund of the fine of Rs.1000/- paid by him under Section 366 IPC. The conviction and sentence under Section 341 is also set aside, since there is no evidence to show that the victim girl has wrongly been restrained by the accused.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To,

1.The Sessions Judge,
Magahir Neethimandram,
Chennai.

2.The Principal Sessions Judge,
Chennai.

3.The VII Metropolitan Magistrate,
Gorge Town, Chennai.

4.-do-The Chief Metropolitan Magistrate,
Egmore, Madras.

5.The Public Prosecutor,
High Court, Madras.

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6.The Inspector of Police,
H6, Radhakrishnan Nagar Police Station,
Korrukupet, Chennai,(Cr.No.1194/2003)

7.The Superintendent, Central Prision,
Vellore.

8. The Director General Police,
Chennai.

9. The District Collector,
Chennai.

+ 1 CC To Mr.N.Sudharsan Advocate SR NO.49731.

Crl.A.No.224 of 2006

BK(CO)
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